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**Does the Posse Comitatus Act create a seam of vulnerability in our territorial waters  
hindering U.S. Northern Command's mission of protecting the homeland?**

**by**

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**A paper submitted to the Faculty of the Naval War College in partial satisfaction of the  
requirements of the Department of Joint Military Operations.**

**The contents of this paper reflect my own personal views and are not necessarily  
endorsed by the Naval War College or the Department of the Navy.**

**Signature: \_\_\_\_\_**

**23 October 2006**

## **Abstract**

*Does the Posse Comitatus Act create a seam of vulnerability in our territorial waters hindering U.S. Northern Command's mission of protecting the homeland?*

This paper will focus on the seam of ambiguity that exists between maritime threats that are not specifically national security or criminal law enforcement. This seam is created by the Posse Comitatus Act which forces decision makers to first look to the authority of available forces verses capabilities. If decision makers do not have specific intelligence that a suspect vessel is a threat to national security requiring destructive force then the U.S. Coast Guard will be the service required to respond in our territorial waters. That level of fidelity in intelligence is rare and as such the U.S. Navy will almost always be excluded from interdiction in our territorial waters. With our expansive maritime boarder the U.S. Coast Guard cannot be expected to patrol and interdict alone. The solution is to modify the Posse Comitatus Act to allow the U.S. Navy to fully engage in maritime homeland security in our territorial waters to act as a force multiplier in defense of the homeland.

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## INTRODUCTION

Homeland security is a defensive game by nature. The enemy always has the ability to strike at the place and time that is most advantageous for them. They use suicide bombings, beheadings, and other atrocities against innocent people as a means to promote their creed.<sup>1</sup> The enemy's victories are beamed across the globe within minutes in full motion color images. While the defenders successes are rarely if ever known. It is the nature of the defensive game in many circumstances that disclosures of success would damage future operations and provide the enemy with valuable intelligence on capabilities and activities of the defenders. The greater probability is that the defenders' failures will make the headlines and no amount of strategic communications will repair the damage. As such the defenders' game is one of no failures and constant speculation. The defender must identify vulnerabilities, strengthen them, and then reflect again to find the new vulnerability. Since the defender has the clearly weaker position it is imperative that as many vulnerabilities as possible be eliminated.

This paper will focus on the seam of ambiguity that lies between threats that are not solely national security or criminal law enforcement. Specifically, within the maritime domain lies a unique vulnerability that cannot presently be addressed with existing law, doctrine, and force structure. That vulnerability exists when vessels not clearly engaged in criminal activities but not clear threats to national security are approaching our shores. It is then that the seam becomes apparent and the world's most powerful nation finds its two maritime forces the U.S. Navy and U.S. Coast Guard controlled by statutory authorities and not capabilities. While this appears at first glance to be a problem of solely doctrine and command and control, a closer inspection reveals the reasons are founded in a law. The

Posse Comitatus Act and the Department of Defense regulation that extends this restriction to the U.S. Navy create a seam in homeland defense that could be exploited by those who wish to do us harm.

## **BACKGROUND**

The founding fathers of the United States had one overarching theme when dividing governmental powers, checks and balances. For the armed forces the application of checks and balances was to place the military under civilian control and authority. Subsequent statutes further defined and limited use of the military in domestic situations. In order to analyze the impacts of using the U.S. Navy to enforce the nation's laws at sea we must first look at the relevant statutes and history of those laws.

There are two significant bodies of law that impact the use of the military domestically. One is the Insurrection Act. The Insurrection Act exists in two variations, aid to state governments and interference with state or federal law.

### 10 USCS § 331. Federal aid for State governments

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.<sup>2</sup>

### 10 USCS § 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it--

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>3</sup>

The Insurrection Act did not exist when the first President to use the military in the enforcement of United States law employed the military in the Whiskey Rebellion of 1794<sup>4</sup>. President George Washington dispatched troops to Western Pennsylvania to enforce compliance with United States revenue laws. While the present version of the Insurrection Act today permits use of the military in limited circumstances these statutes do not permit the use of the U.S. Navy in support of homeland security in the maritime theater. While not explicit in the statute, insurrection is defined as "[a] rebellion, or rising of citizens or subjects in resistance to their government."<sup>5</sup> The threat posed by terrorists clearly does not fit into this definition and therefore excludes this statute as potential authority for the use of the U.S. Navy in homeland security.

The second body of law is the Posse Comitatus Act. Posse comitatus is defined as "[t]he entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc."<sup>6</sup> The Posse Comitatus Act became United States Law, in 1878 during the reconstruction era.

#### 18 USCS § 1385. Use of Army and Air Force as Posse Comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>7</sup>

Although the Posse Comitatus Act, *18 USCS § 1385*, does not directly reference the U.S. Navy or U.S. Marine Corps, the ability to engage in enforcing civilian laws has been



eliminated by the Department of Defense Directive, (DODD), 5525.5(c) promulgated under *10 USCS § 375*, and Secretary of the Navy Instruction, SECNAVINST 5820.7B. The directive and instruction have made the Posse Comitatus Act applicable to the U.S. Navy and U.S. Marine Corps as matter of Department of Defense policy. Congress over the years has made several significant exceptions to the statute that allows both the use of military equipment and training to support law enforcement and in drug interdiction efforts.

Since the implementation of the Posse Comitatus Act and the Department of Defense policy to extend that statute to the U.S. Navy and U.S. Marine Corps there have been no successful convictions of a violation of the Posse Comitatus Act. However, in the various cases over the years the courts have attempted to clarify both the drafters' intent of the Posse Comitatus Act and its applicability to the variety of challenges we as a nation have faced since 1878. While the Posse Comitatus Act has been determined to apply to law enforcement actions such as arrest, search and seizure, and other purely law enforcement activities the complexity of our modern society and the global reach of criminals has generally caused further blurring of the lines between the military and law enforcement.

The most significant change has been the U.S. Navy's involvement in counter drug operations with the U.S. Coast Guard. Statutorily approved as an exception to the Posse Comitatus Act the involvement requires a U.S. Coast Guard law enforcement detachment on board the naval vessel during counter drug operations. Once a law enforcement measure is required to be taken such as arrest of suspects the tactical control of the naval vessel shifts to the control of the senior U.S. Coast Guard officer on board who then directs both U.S. Coast Guard and U.S. Navy personnel in the law enforcement action. While challenged in court

this assistance to law enforcement has survived judicial review and is part of the U.S. Navy's regular mission.

## **ANALYSIS**

### Threat:

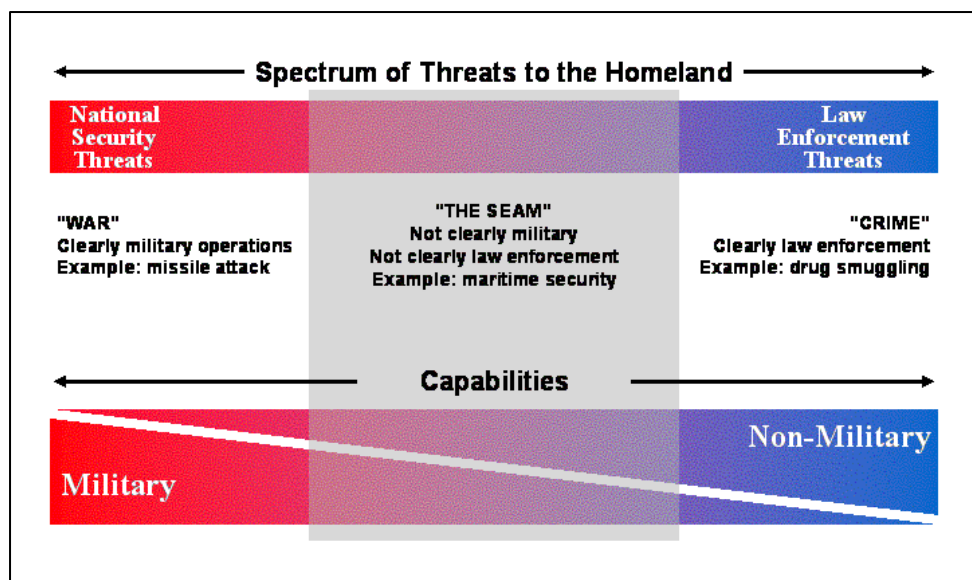
The terrorist attacks of September 11<sup>th</sup> 2001 dramatically changed the Pentagon's priorities, as well as the military's role in homeland security forever. Strategic study and thought stated that the United States was essentially safe even from potential peer competitors except for intercontinental ballistic missiles. However, an asymmetric threat from well financed terrorist proved those beliefs wrong. The September 11th attacks inflicted casualties and material damages on a far greater scale than any other terrorist aggression.<sup>8</sup> Lower Manhattan lost approximately 30 percent of its office space and a number of businesses ceased to exist. Close to 200,000 jobs were eliminated or relocated out of New York City.<sup>9</sup> The destruction of physical assets was estimated at \$14 billion for private businesses, \$1.5 billion for state and local government and \$0.7 billion for federal agencies.<sup>10</sup> Rescue, cleanup and related costs have been estimated to amount to at least \$11 billion for a total direct cost of \$27.2 billion.<sup>11</sup> These figures do not include the national economic impact.

Since then sweeping changes in aviation security have made the use of commercial aircraft as flying bombs more difficult. However, other potential threats remain. The former Commandant of the U.S. Coast Guard remarked, "...tighter security in aviation will likely cause terrorist to use alternate means to attack our country, among these alternative means will be maritime transportation."<sup>12</sup> Some believe a successful maritime attack could be much more devastating than the attacks of September 11<sup>th</sup> 2001.<sup>13</sup> If correct it is imperative that

the nation now focus its efforts on securing our maritime borders while permitting the free flow of commerce that supports our markets, livelihoods, and nation.

### Maritime Seam of Vulnerability

The seam of vulnerability lies with the law of posse comitatus. The U.S. Navy is not permitted to engage in maritime law enforcement. This fact prohibits the U.S. Navy from fully engaging its force within our territorial seas, the maritime space. As such the U.S. Navy's inability to engage in the maritime space of our territorial waters removes the ability to employ hundreds of vessels and thousands of personnel from protecting the homeland.



Source: Department of Defense, Homeland Security Joint Operating Concept

In order for the U.S. Navy to intercept a target vessel Northcom must know if the vessel is a threat to national security. If the vessel is a threat to national security then it is an act of war which permits the U.S. Navy to engage the target and either stop it or destroy it even in territorial waters. If Northcom or the DHS does not have sufficient information that

the suspect vessel is a threat to national security then there is little choice but to dispatch the U.S. Coast Guard under its law enforcement authority. Therefore, both Northcom and DHS need to have detailed intelligence in order to decide which force, U.S. Coast Guard or U.S. Navy should intercept. If the intelligence does not develop sufficiently and the threat is within our territorial waters then the U.S. Coast Guard will be required to respond. The distinction between war and crime therefore creates a seam that could be exploited by terrorist. Northcom has identified this seam and calls it the "seam between war and crime".<sup>14</sup>

#### Law:

The terrorist attacks on the United States have presented our nation with new challenges and threats that must be met in order to preserve our freedoms and way of life. In the aftermath of September 11<sup>th</sup>, and the vulnerability of our maritime borders the Posse Comitatus Act again has come under review. In the ongoing debate of the Posse Comitatus Act the legislature has promulgated another statute in an attempt to clarify there perception of the Posse Comitatus Act.

#### 6 USCS § 466

§ 466. Sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus Act

(a) Findings. Congress finds the following:

(1) *Section 1385 of title 18, United States Code* (commonly known as the "Posse Comitatus Act"), prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(2) Enacted in 1878, the Posse Comitatus Act was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law.

(3) The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law.

(4) Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.

(5) Existing laws, including chapter 15 of title 10, United States Code [10 USCS § § 331 et seq.] (commonly known as the "Insurrection Act"), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order.

(b) Sense of Congress. Congress reaffirms the continued importance of *section 1385 of title 18, United States Code*, and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.<sup>15</sup>

Unfortunately, the restatement does not reflect the actual impact the Posse Comitatus Act has on the individual services. The statute categorizes all the services as one armed force which fails to distinguish the theater in which each service is primarily employed ignoring the possibility of new homeland security missions for some of the services.

#### Maritime Space:

The maritime border of the United States is 19,924 nautical miles and our territorial sea extends twelve nautical miles.<sup>16</sup> Within the twelve nautical mile territorial waters the United States may enforce its jurisdiction and laws. From twelve nautical miles to twenty four nautical miles the United States may enforce limited jurisdiction primarily laws pertaining to customs and safety. This is a tremendous space to patrol in order to protect the homeland. The vast majority of this maritime space is accessible twenty four hours a day

every day of the year. Little of any of the maritime space is inaccessible due to weather, ice, or sea state. If inaccessible it is only in that condition for a relatively small time frame. As such our maritime security efforts must be large and diverse.

Additionally, there is a tremendous volume of commercial shipping that enters territorial waters annually. The U.S. Department of Transportation reported in 2005 over three million port visits by commercial vessels at our twenty largest ports of call.<sup>17</sup> This number increases on average around 2.26% a year.<sup>18</sup> This statistic does not include passenger ship visits or small ports of call. This tremendous volume of traffic is due in part to our prosperity and presents a daunting challenge for maritime security.

#### Maritime Force:

The United States Coast Guard, a 216 year old military, multi-mission maritime service has the statutory duty of enforcing United States maritime law within our territorial seas to include our economic exclusion zone of two hundred nautical miles.<sup>19</sup> The U.S. Coast Guard has the unique status of being both a military force with law enforcement authority and is not covered by the Posse Comitatus Act. The U.S. Coast Guard has a diverse mission which in addition to homeland security also includes sea rescue, interdiction, counter drug operations, hazardous material spills, marine wildlife protection, and waterfront facility safety and security.<sup>20</sup> In 2003 the U.S. Coast Guard was transferred to the newly formed Department of Homeland Security, (DHS) from the Department of Transportation.<sup>21</sup> The U.S. Coast Guard has a fleet of 252 cutters, and 36,869 active duty personnel.<sup>22</sup>

The United States Navy has a fleet of 282 deployable battle force ships, and 351,670 active duty personnel.<sup>23</sup> Founded in 1775 the Navy has the statutory duty to maintain, train

and equip combat-ready naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas.<sup>24</sup>

U.S. Northern Command, (Northcom) was established in 2002 to provide command and control of Department of Defense homeland defense efforts and to coordinate defense support of civil authorities.<sup>25</sup> Northcom's mission is to defend America's homeland protecting our people, national power, and freedom of action.<sup>26</sup> Northcom's area of responsibility includes air, land and sea approaches and the continental United States, Alaska, Canada, Mexico and the surrounding water out to approximately 500 nautical miles.<sup>27</sup> "It also includes the Gulf of Mexico and the Straits of Florida."<sup>28</sup> "The defense of Hawaii and our territories and possessions in the Pacific is the responsibility of U.S. Pacific Command."<sup>29</sup> "The defense of Puerto Rico and the U.S. Virgin Islands is the responsibility of U.S. Southern Command."<sup>30</sup> "Northcom consolidates under a single unified command existing missions that were previously executed by other DoD organizations."<sup>31</sup> "This provides unity of command, which is critical to mission accomplishment."<sup>32</sup> When naval forces are assigned to Northcom and conducting operations within the United States territorial waters those forces are subject to the Posse Comitatus Act.

#### Space and Force:

Since the Posse Comitatus Act is a bar to full engagement of the U.S. Navy in maritime homeland security, is the U.S. Coast Guard capable of fulfilling the mission? The United States Coast Guard has the authority to engage in law enforcement actions at sea, and can use force if faced with a threat to homeland defense without any further authorities. The U.S. Coast Guard can pursue the felon as well as a terrorist threatening national security and

take appropriate action. However, the U.S. Coast Guard does not have an adequate fleet size to provide a credible deterrent for our expansive borders. Additionally, it will take the U.S. Coast Guard years before its planned deep water fleet is operational. Even when operational it would be cost prohibitive to build and sustain a U.S. Coast Guard fleet that could guarantee border security.

While the U.S. Coast Guard has without doubt focused its efforts on homeland security they have a variety of other statutorily directed missions to perform that are not related to homeland security. As such the U.S. Coast Guard may not be able to adequately meet all its statutorily required missions and it may be cost prohibitive to develop the U.S. Coast Guard to fully protect our borders. Therefore, a modification to the Posse Comitatus Act could act as a force multiplier by allowing portions of the existing U.S. Navy fleet to fully engage in maritime homeland security versus merely supporting law enforcement.

#### Maritime Intelligence; *Time*:

In response to this asymmetric threat significant work has begun on fusing all sources of maritime intelligence into one center for analysis and tracking. The Maritime Intelligence Fusion Center Atlantic, (MIFC LANT) mission is to provide tactically actionable intelligence support.<sup>33</sup> The largest maritime intelligence facility the MIFC LANT team will include over 80 full-time military and civilian positions, with another 45 reserve billets and a dozen liaisons for other government agencies.<sup>34</sup> Without doubt the result of this unprecedented intelligence fusion center linking military, civilian, and other government agencies will generate the most comprehensive and integrated picture of the maritime domain. Greater maritime awareness will provide us with more information on a larger number of commercial and private vessels that has not previously been available. However, the result of this greater



maritime awareness will be an exponential growth in the number of vessels that are of interest.

#### Maritime Space, Time, Force:

While the maritime intelligence fusion center will provide a more comprehensive maritime picture, it will also need to provide intelligence on a larger number of suspect vessels. Suspicious vessels can either be carrying weapons of mass destruction or illegal substances like drugs or human cargo, including terrorist. The maritime intelligence fusion center will be required to provide detailed intelligence on each suspect vessel. Specifically, is that vessel a threat to national security or engaged in criminal activity, war, or crime. The reason the intelligence center will be required to make a war or crime determination is due to the legal requirements of the Posse Comitatus Act. The war or crime intelligence will be required by decision makers to determine who will intercept, the U.S. Navy or U.S. Coast Guard. In order to engage the U.S. Navy in our territorial waters the maritime intelligence fusion center must provide actionable intelligence which unambiguously supports taking destructive military action against the vessel.<sup>35</sup> This level of fidelity in intelligence is extremely difficult especially given the volume of shipping and the limited time. It is therefore, unreasonable to expect that the maritime intelligence fusion center will be able to provide the kind of detailed intelligence on every suspect vessel required to make the war or crime determination prior to the vessels arrival in our territorial waters.

While this is less of a concern in international waters the reality is that with the volume of commercial and private maritime traffic on any given day on approach to our shores even the world's best intelligence center will not likely have sufficient information to

know what the threat is precisely, war or crime. Absent the clear designation of a vessel as hostile and the United States is exercising an inherent right of self defense international law places some restrictions on what can be done to foreign flagged vessels on the high seas.<sup>36</sup> As such, the default response for interception will be the U.S. Coast Guard under a law enforcement mission. The U.S. Coast Guard will be the default responder because the vessel will either already be within our territorial waters or there will be insufficient intelligence that the vessel is a threat to national security. With the U.S. Coast Guard's large and varied mission it is unrealistic to believe that they will be able to interdict every vessel the fusion center believes should be boarded.

While there is no doubt that a high interest vessel would be stopped by any means necessary including the U.S. Navy, the risk is that if interdicted within our territorial waters evidence of criminal activity would be inadmissible in a court. Not a problem if an actual terrorist threat is thwarted, but a significant problem if a stash of kidnapped women who were being transported for sexual slavery were found and no prosecutions could be obtained due to the Posse Comitatus Act. The fusion center's products will be a significant asset to the war on terror but in order to make the most use of this information a greater number of interdictions will be needed and will require the full engagement of the U.S. Navy in our territorial waters. While the majority of intercepts will be negative for threats to national security most will reveal criminal violations. If the U.S. Navy does not have a Coast Guard law enforcement detachment on board and there is no Coast Guard or Customs vessels in the area otherwise identified criminal activity would go unchallenged. Without a change to Posse Comitatus Act, the law will become a criminal's best friend as evidence seized during intercepts would not be admissible in court. As a result the U.S. Military the world's most

powerful Military is unnecessarily constrained for threats within our territorial waters. A modification to Posse Comitatus Act will allow the U.S. Navy's law enforcement actions to be valid just as the U.S. Coast Guard, and permit full engagement of all national assets in the war on terror and protection of the homeland.

#### Military Command and Control:

With a congressional reaffirmation of the Posse Comitatus Act and the need for the U.S. Navy to have a much more significant role in maritime homeland defense, Northcom and its Joint Force Maritime Component Commander, United States Fleet Forces Command, in Norfolk Virginia, have implemented an operating plan in an effort to bridge the gap between homeland defense and security. This plan is an attempt to minimize the seam without a statutory change to the Posse Comitatus Act. However, the plan still employs U.S. Coast Guard detachments operating onboard U.S. Navy vessels and or time critical decisions that must be made by high ranking officials who may not have the needed intelligence on the target vessel. Specifically, even with access to the maritime intelligence fusion center it is unlikely the decision maker will have enough information to know if the threat is truly one of national security or law enforcement. This point is critical for the decision maker as under the present legal construct it determines who he sends to intercept, the U.S. Navy or U.S. Coast Guard. Presently if he sends the U.S. Navy and it ultimately is determined to be a law enforcement matter, the suspects might be immune to prosecution if the intercept occurs within our territorial waters. Alternatively if the U.S. Coast Guard is sent and it is truly a national security matter they may not have sufficient fire power to disable or destroy the threat. Therefore the decision of which force interdicts is extremely important. If the Posse

Comitatus Act was modified to permit maritime law enforcement by the U.S. Navy the risk is mitigated to one of only who is the best asset to intercept. The issue of national security threat or law enforcement becomes moot, and criminals who are discovered during a U.S. Navy intercept will face the full force of the Department of Justice in a criminal prosecution. Intelligence assets no longer need to focus on the domestic categorization of the threat as war or crime, and decision makers can focus on capabilities of the interdiction force and not the authorities of that force. Threats that the U.S. Coast Guard can successfully thwart can be pursued by them, and larger threats requiring potentially greater force can be successfully intercepted by assets with more fire power no matter what maritime location the threat is finally seized.

In war gaming conducted by Northcom, "Unified Defense", awareness of the seam was not enough to avoid confusion. Post war game analysis stated that "[a]lthough there was guidance from the national level to operational and tactical organizations, for some participants the decisions process between HLD\* and HLS\*\* events remains vague."<sup>37</sup> The seam between maritime homeland defense and security is therefore a viable avenue for exploitation from terrorist who desire to harm our nation's people and her economy. As such it is important to eliminate this seam in an economically viable way providing greater security and foreclosing a potential vulnerability. By modifying the Posse Comitatus Act to allow the U.S. Navy to engage in maritime law enforcement we combine and existing an capable fleet who sails the same waters as a force multiplier in the war on terror and the security of our homeland.

\*Homeland defense

\*\*Homeland security

Doctrine:

Finally, some have argued that adding the homeland security mission to the U.S. Navy would dull their ability to fight a peer competitor. The last time the U.S. Navy fought a peer competitor was World War II. Since then our strength and alliances have eliminated peer competitors. While that does not prevent a new peer competitor from arising it should not be a reason the U.S. Navy passes on a mission vital to the United States. With the disappearance of a peer competitor and the appearance of an enemy who hides among civilian populations, naval forces have already changed the way they conduct military operations. In the present global environment there has been little call for all-out force against another navy or vessel. Rarely is force the first choice in interdiction. Rarely is outright destruction of the target vessel ordered. As such interceptions, interdictions, and seizures have become the norm for U.S. Navy forces engaged in military action globally. Therefore, training for the mission of maritime interdiction is already ongoing. Constitutionally based law enforcement is also already part of the training in the U.S. Navy for all Masters at Arms, who engage in law enforcement duties on board vessels and naval installations. Adding constitutionally-based law enforcement requirements would be the only additional training required for interdiction forces.

While U.S. Navy personnel would require additional training to conduct maritime law enforcement mission in U.S. Territorial waters, this training is not exceptionally difficult and would be beneficial if applied in spirit to overseas operations. Specifically, if U.S. Navy forces that had been trained for U.S. maritime law enforcement missions followed the spirit of these rules for international maritime interdictions there is a significantly smaller chance that innocent mariners overseas would depart the boarding with negative feelings about the

United States and its forces which supports other aspects of national power specifically military support to diplomacy.

If the U.S. Navy avoids expansion into maritime security they run the risk of making themselves obsolete. As more time passes without a maritime peer competitor, the legislature and taxpayers will put more pressure to reduce funding. As such it is important that the U.S. Navy continue to impress its sponsors by adding the homeland security mission.

#### Policy Concerns:

In analyzing the definition of posse comitatus and the subsequent Act, and the events surrounding the signing of the act into law it is clear that the focus was on limiting the Army and Air Force from being used in support of land based domestic law enforcement. The Army and Air Force are the two armed forces that posed the greatest threat to the civilian population if improperly used for domestic situations.

While there is historical precedent for restricting the unlimited use of armed forces on land, does that concern hold true for the sea? The law enforcement environment at sea is significantly different from that of the land. The vast majority of Americans live on land, and are impacted significantly by military actions occurring on the land, hence the applicability of the Posse Comitatus Act. While many law abiding Americans own personal vessels capable of navigating our territorial seas the original concerns surrounding the Posse Comitatus Act are not reasonably applied to law enforcement actions at sea. At sea, the physical environment is more dangerous and demanding, and as such limits the extent and nature of purely civilian activity.

The courts have also acknowledged the difference between law enforcement on land and sea and permits different judicial standards. Specifically, U.S. Coast Guard personnel may stop and board any vessel without suspicion of illegal activity that must exist before a citizen on the land is stopped and detained.<sup>38</sup> Similarly, U.S. Coast Guard personnel do not need to obtain a warrant for arrests, searches and seizures at sea like their land based counterparts must.<sup>39</sup> With the vast majority of Americans not affected and the courts recognition that law enforcement at sea is more challenging then on land the argument for the Posse Comitatus Act to apply to U.S. Navy law enforcement activities at sea is unwarranted. U.S. Navy involvement in law enforcement at sea will not erode or diminish American liberties. In reality it will protect them by ensuring criminals and terrorists are unsuccessful. The long and successful history of U.S. Navy support of law enforcement at sea especially in drug interdiction also supports the argument that liberties will not be eroded. Given proper training the U.S. Navy could provide a tremendous force in the protection of our homeland without jeopardizing civil liberties.

## **RECOMMENDATIONS**

### **Modification of the Posse Comitatus Act:**

In order to permit the U.S. Navy to fully engage in maritime law enforcement would not require a revocation of the Posse Comitatus Act, but a modification. Specifically, the Posse Comitatus Act would be redrafted to specifically permit the U.S. Navy to engage in maritime law enforcement, and continue to exclude land based military enforcement of civilian law. The new statute would also specifically provide individual service members and commanding officers the same protections under the law from civil litigation that protects other federal law enforcement personnel. Posse comitatus as such would remain in

effect as it has since 1878 for military actions on the land in United States Territory. The proposed modification would not require any changes or modifications to the Insurrection Act.

Obviously with this change to the statute the Department of Defense Directive and companion Secretary of the Navy Instruction would be completely re-drafted to provide specific guidance to commanders pertaining to posse comitatus application at land and sea. Finally, the U.S. Navy would be required to modify existing training to incorporate the new mission and ensure forces were ready.

## **CONCLUSIONS**

While there are tremendous challenges for homeland defense and security in a free society it is vital that as many of those vulnerabilities that can be identified are eliminated without damaging the freedoms we cherish. Seams such as those discussed in this paper will exist in many forms but when created by our own laws should be investigated with a goal of mitigating them if not eliminating them. While our founding fathers were concerned about checks and balances this recommended change does not impact that constitutional theme. While there has been historic concern of using the armed forces to engage in law enforcement, that concern does not extend to the territorial seas.

Although the U.S. Coast Guard presently has the authority to engage in both maritime law enforcement and homeland defense, they do not have a sufficient fleet to meet all there statutory requirements. Once the maritime intelligence fusion center draws a clearer picture of the maritime domain, the U. S. Coast Guard will need assistance. With the courts understanding that law enforcement is different at sea, the need for a larger presence at sea for deterrence, and the increase maritime operational picture, it is clear that a modification to



the Posse Comitatus Act may be necessary. This modification would permit decision makers to focus on the capabilities of the asset to be dispatched and not the authorities.

The elimination of a peer competitor and the changed global environment permit the U.S. Navy to assume additional responsibilities in maritime homeland security without impacting their ability to defend from a future peer competitor. Modification of the Posse Comitatus Act dramatically increases the number of capable forces and personnel who sail the same seas to fully engage in maritime homeland security. Therefore, the risk associated with permitting the U.S. Navy to fully engage in maritime law enforcement are overshadowed by the risk to our homeland from terrorists who are ideologically committed to the outright destruction of our nation, society, and people without any regard for their own lives or the lives of innocent people.

## NOTES

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<sup>1</sup> Whitehouse, National Strategy for Combating Terrorism, (Washington, DC: 2006)

<sup>2</sup> Insurrection Act, U.S. Code, Title 10, secs. 331, (2006)

<sup>3</sup> Insurrection Act, U.S. Code, Title 10, secs. 333, (2006)

<sup>4</sup> David Bradford, Causes of the Whiskey Rebellion, 2006, <http://www.whiskeyrebellion.org/rebell.htm>, [1 October 2006]

<sup>5</sup> Blacks Law Dictionary, Insurrection, 5<sup>th</sup> ed.

<sup>6</sup> Blacks Law Dictionary, Posse Comitatus, 5<sup>th</sup> ed.

<sup>7</sup> Posse Comitatus Act, U.S. Code, Title 18, secs. 1385, (2006)

<sup>8</sup> Robert Looney, "Economic Costs to the United States Stemming From the 9/11 Attacks" Center for Contemporary Conflict, Naval Post Graduate School, Strategic Insights, Volume I, Issue 6 (August 2002)

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Commandant VADM Thomas Collins, "Maritime Security Plan" speech, U.S. Naval Institute, quoted in Commander Steven D. Poulin, USCG, "Realigning Coast Guard Enhanced Maritime Capabilities", (Unpublished Research Paper, U.S. Army War College, Carlisle, Pennsylvania: 2005)

<sup>13</sup> Stephen Flynn, America the Vulnerable How Our Government is Failing to Protect Us from Terrorism, (New York: HarperCollins Publishers, 2004)

<sup>14</sup> U.S. Northern Command, Department of Defense Homeland Security Joint Operating Concept (Colorado Springs, CO: 2004), 8

<sup>15</sup> Posse Comitatus Act, U.S. Code, Title 6, secs. 466, (2006)

<sup>16</sup> Central Intelligence Agency, World Factbook 19 September 2006

<<https://www.cia.gov/cia/publications/factbook/geos/us.html#Geo>> [19 September 2006]

<sup>17</sup> Department of Transportation, Vessel Calls at U.S. Ports 2005 (Washington, DC: 2005) 7

<sup>18</sup> Ibid. Pg 7

<sup>19</sup> Department of Homeland Security, United States Coast Guard Snapshot (Washington, DC: 2005)

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- <sup>20</sup> United States Coast Guard Homepage 2006, <<http://www.uscg.mil/overview/index.shtm>> [22 September 2006]
- <sup>21</sup> Department of Homeland Security, United States Coast Guard Snapshot (Washington, DC: 2005)
- <sup>22</sup> Ibid. Pg 1
- <sup>23</sup> Department of the Navy Homepage, Status of Navy 2006, <[http://www.navy.mil/navy/data/navy\\_legacy.asp?id=146](http://www.navy.mil/navy/data/navy_legacy.asp?id=146), [22 September 2006]
- <sup>24</sup> Department of the Navy Homepage, Navy Misison, 2006 <<http://www.navy.mil/navydata/organization/org-top.asp>> [22 September 2006]
- <sup>25</sup> United States Northern Command Homepage, 2006, <[http://www.northcom.mil/about\\_us/about\\_us.htm](http://www.northcom.mil/about_us/about_us.htm)> [23 September 2006]
- <sup>26</sup> Ibid.
- <sup>27</sup> Ibid.
- <sup>28</sup> Ibid.
- <sup>29</sup> Ibid.
- <sup>30</sup> Ibid.
- <sup>31</sup> Ibid.
- <sup>32</sup> Ibid.
- <sup>33</sup> "U.S. Coast Guard Maritime Intelligence Fusion Center Atlantic," Welcome Aboard. 2 December 2003. <<http://www.uscg.mil/lantarea/mifclant/welcomeaboard.htm>> [17 September 2006]
- <sup>34</sup> Ibid.
- <sup>35</sup> CDR William R. Kelly, "Homeland Security, Homeland Defense and Clarifying Northern Command's Maritime Role," (Unpublished Research Paper, U.S. Naval War College, Newport, RI: 2004)
- <sup>36</sup> Ibid. Pg. 14
- <sup>37</sup> U.S. Northern Command, NORAD and USNORTHCOM Master Exercise Summary Report Vigilant Overview and Unified Defense (Colorado Springs, CO: 2004), 12
- <sup>38</sup> Christopher A. Abel, "Not Fit for Sea Duty: The Posse Comitatus Act, The United States Navy, and Federal Law Enforcement at Sea" William and Mary Law Review, 31 Wm and Mary L. Rev 445, (1990) 476
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